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BOARD CERTIFIED Administrative Law

December 7, 2011

Notice of *Ex Parte*; Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington D.C. 20554

RE: *In the Matter of Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42

Dear Ms. Dortch:

Pursuant to 47 C.F.R. § 1.1206 of the Commission's rules, Lifelink Wireless, LLC ("Lifelink") respectfully submits this notice of permitted ex parte communication into the above-captioned proceeding.

On December 6, 2011 the undersigned – on behalf of Lifelink – conducted a telephonic meeting with Kimberly Scardino, Divya Shenoy and Garnet Hanly of the Wireline Competition Bureau to discuss certain issues in the proceeding. Lifelink distributed the attached materials, which formed the basis of the discussions.

Thank you.

Sincerely,

W. Scott McCollough
Counsel for Lifelink Wireless, LLC

Lifelink Wireless, LLC

Telephonic *Ex Parte* Presentation
Lifeline/Link Up
WC Docket 11-42
December 6, 2011

Lifelink Wireless LLC
8400 Normandale Lake Blvd.
Bloomington, MN 55437

Summary

- Lifelink is considering a significant business investment to participate in the Lifeline/Link Up Low Income program, and wants to be a positive actor. It is holding back due to conflicting positions by industry and regulators over current rules and what the new rules should require regarding the "own facilities" issue and Link Up support. We have specific suggestions and thoughts on these topics:
- ETC Certification Process should include significant evidentiary documentation requirement.
  - The FCC should specify specific types of documentary evidence that should be required to demonstrate that a "facilities based" ETC actually has its "own facilities" and that they are used to provide the supported services.
  - The FCC should use the iTRS documentary evidence rules (64.606(a)(2)) as a model.
- Supplement the rules by requiring the carrier to at minimum have "own spectrum" as direct radio station licensee or secondary market lessee along with proof of "build out" in at least one state.
- Otherwise maintain the current rule providing that a carrier is eligible for ETC status if it has its own facilities used to provide any one (1) supported service in the designated area, regardless of where the facilities (and Spectrum) are located.
- The physical location of the "facilities" should be irrelevant. Neither the actual "facilities" nor the "Spectrum" needs to be located within the state the ETC seeks or has ETC certification so long as some kind of "own facilities" are used to provide a supported service in the state.
- Facilities based ETCs incur service establishment costs and should recover reasonable Link Up support.

ETC Certification – What is “own facilities?”

Current rules:

- “Own facilities” means “physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support.”
- The facilities must be used to provide any of one or more supported service in the designated area, without regard to where the specific facilities may be located.
- 54.101 lists 9 supported services, including, *inter alia*, “access to operator services” (54.101(a)(6)), “access to interexchange service” (54.101(a)(7)) and “access to directory assistance” (54.101(a)(8)).

New rules:

- Commission should maintain each of these rules, but impose stricter oversight through detailed evidentiary demonstration that ETCs prove ownership of “own facilities.”
- Supplement the rules by requiring the carrier to at minimum have “own spectrum” as direct radio station licensee or secondary market lessee along with proof of “build out” in at least one state.

ETC Certification – "resale" is not "own facilities"

- Some entities asserting they have "own facilities" are in truth mere resellers, or even resellers of resellers. The misclassification takes various forms:
  - The entity may simply be a "reseller of an MNVO" without a direct wholesale agreement with a Tier I provider.
  - The entity may not have a real switch or a true switch lease.
  - "White Label Providers" - mere resellers of an MNVO and without actual "own facilities" are proliferating.
  - To eliminate opportunities for abuse, the Commission should ensure that "facilities based" providers own actual "own facilities" rather than using disguised resale, and that the ETC exercises oversight of, and is accountable for, provision of supported services, including the claimed "own facilities."
- Non-facilities based resellers must seek forbearance before seeking ETC status.
- True facilities based ETCs do not need to seek forbearance.

ETC Certification – Adopt Specific Evidentiary Documentation Requirements for "own facilities"

- Some entities merely have the subscriber call "free 411" services and label this as "access to directory assistance." No "own facilities" are used.
- Some entities employ "revenue-sharing" arrangements that claim to be "leases" but are not true leases.
  - Entities that lease a switch (as opposed to owning a switch) should be required to produce a valid written lease demonstrating an arm's length transaction.
  - The lease should show true dominion and "exclusive use." *See 1997 USF Order* ¶¶ 158-159.
  - "Facilities based" providers should have to demonstrate they have committed material expenditures to owning and operating their own facilities.
- Current certification process contains no evidentiary documentation requirement.
  - ETCs claiming "own facilities" should be required to provide documentary and other evidentiary support of their claims, including that the "own facilities" will be used to provide a supported service in the state for which certification is sought.

ETC Certification – Adopt Specific Evidentiary Documentation Requirements for "own facilities"

- The Commission should specify the documentary evidence that will satisfactorily demonstrate that an ETC actually is a true "facilities based" provider.
- Use the iTRS documentary evidence rules (64.606(a)(2)) as a model. *See Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Second Report and Order and Order, ¶¶ 21-34, 26 FCC Rcd 10898, 10907-10914 (2011) ("*iTRS Certification Order*").

Link Up – "Own Facilities" ETC vs. "Forbearance ETCs"

- True facilities based ETCs get Link-Up; Forbearance ETCs do not get Link-Up.
- An entity desiring ETC status that does not truly have its "own facilities" must seek forbearance from the facilities requirement.
- "Forbearance ETCs" are typically denied Link Up as a condition of forbearance.
- <u>Commission should require ETCs to meet new "own facilities" requirements, including documentary demonstration, on a prospective basis in order to continue receiving Link-up.</u>

Link Up Support - "Facilities based" ETC should be allowed to recover a reasonable approximation of upfront costs

- “Wireless” and “wireline” facilities based ETCs incur valid service initiation costs, and are entitled to recover a reasonable approximation of those costs. If recovery is denied or the amount is too low, providers will pass the cost on to low income applicants, and this will erect a barrier to subscription. USF support is designed to compensate ETCs for lost revenue on account of the discounts, and compensate the ETC for providing certain specific services.
- An obligation to provide a discount to eligible customers coupled with a denial of reasonable support to compensate a facilities based ETC for the discount would be a “taking” and violate the requirement in §254(e) that support be “sufficient.”
- “Facilities based” ETCs should recover a specific amount from the fund to compensate for the reasonable cost associated with service establishment.
- The Commission can set a unitary price using the current $30 cap.
- The Commission can compile information and calculate the industry average service establishment cost and use the average or some decremented amount below the average as the Link Up support amount per qualified user.
- The Commission should maintain exclusion of handset procurement costs.